United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1905.

No. 1591 **382**

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[redacted]

FILED JULY 27, 1905.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1905.

No. 1591.

NONIE L. SULLIVAN, ADMINISTRATRIX OF THE ESTATE OF ARTHUR J. SULLIVAN, DECEASED, APPELLANT,

vs.

VIRGINIA C. HUIDEKOPER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 24, 1905.

In the Court of Appeals of the District of Columbia.

NONIE L. SULLIVAN, Administratrix of the Estate of Arthur J. Sullivan, Deceased, Appellant,
vs.
VIRGINIA C. HUIDEKOPER. } No. 1591.

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a Supreme Court of the District of Columbia.

NONIE L. SULLIVAN, Administratrix of the Estate of Arthur J. Sullivan, Deceased, Plaintiff,
vs.
VIRGINIA C. HUIDEKOPER and THE DISTRICT of Columbia, a Corporation, Defendants. } No. 47090. At Law.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss*:

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Declaration.*

Filed June 22, 1904.

In the Supreme Court of the District of Columbia.

NONIE L. SULLIVAN, Administratrix of the Estate of Arthur J. Sullivan, Deceased, Plaintiff,
vs.
VIRGINIA C. HUIDEKOPER and THE DISTRICT OF Columbia, a Corporation, Defendants. } Law. No. 47090.

The plaintiff, Nonie L. Sullivan, to whom letters of administration have been issued by the supreme court of the District of Columbia, holding a probate court, upon the estate of Arthur J. Sullivan, deceased, sues the defendants, Virginia C. Huidekoper and The District of Columbia, for that heretofore, to wit, on the 8th day of June, A. D. 1904, by an injury done and happened within the limits of

the District of Columbia, the death of the said Arthur J. Sullivan was caused by the wrongful act, neglect and default of the said defendants, which said wrongful act, neglect and default was such as would, if the death of the said Arthur J. Sullivan had not ensued, entitled him to maintain an action against the said defendants; and that at the time of the happening of said injury hereinafter more fully set out, the defendant, Virginia C. Huidekoper, was and now is the owner of a certain square of land in the District of Columbia, distinguished upon the ground plan of the city of Washington as block 146 in part of Burleith addition to West Washington; and the District of Columbia was and now is

2 a body corporate for municipal purposes, duly created and organized by virtue of the laws of the United States of America, and charged among other duties, with the duty of constructing and maintaining the streets and highways of the city of Washington, and of the District of Columbia; that said block 146, upon and over which flowed two (2) small streams of water, was and is situated in a public but unenclosed place immediately adjacent to certain public streets of said city of Washington, to wit, " W " street north, and Thirty-seventh street west, and in the immediate vicinity of and surrounding said block 146 were the residences of large numbers of persons, including many young children of tender years; that it was the duty of the defendant, Virginia C. Huidekoper, as the owner of said block 146, not to allow any nuisance or any dangerous pit, or pond of water, or any other dangerous agency, of such a character as to be attractive to young children to exist thereon and to be and to remain unprotected and unguarded, and it was the duty of the defendant, The District of Columbia, in maintaining and constructing the streets of said city, not to so negligently maintain or construct such streets as to cause or make, or allow to be caused or made, upon or adjacent to said streets, any such dangerous pit or pond, or agency as aforesaid, or to allow the same to remain unprotected and unguarded as aforesaid:

But the plaintiff avers that the defendants disregarded their duty in the premises, and in violation thereof, the defendant, The District of Columbia, through its officers, and agents, and the defendant, Virginia C. Huidekoper, her agents and employees, acting under the

3 authority and by permission of the defendant, The District of Columbia, did so carelessly and negligently construct and maintain that part of said " W " street, lying immediately west of the point of its intersection with Thirty-seventh street, and that part of Thirty-seventh street, immediately to the north of said " W " street, that there was caused and created, immediately between said streets at the point of intersection thereof, a deep and dangerous depression upon said block 146, or a large part thereof, with very steep and almost perpendicular banks along the north line of said " W " street, and along the west line of said Thirty-seventh street, of a depth of about — feet, of a length of about — feet, and of a width of about — feet, so that said streets became and acted as

a large dam without any proper or adequate provisions, means or efforts being made for filling up the depression so made as aforesaid, or for allowing the waters of the streams aforesaid, to sufficiently drain off or escape, when and as the same gathered or accumulated thereon; and by reason of such, the waters of said streams were dammed up and collected and formed in said dangerous depression a dangerous pond, covering said block 146, or a large part thereof, with a length of about two hundred and fifty (250) feet, and a width of about ninety (90) feet, the water in said pond, particularly in the parts thereof immediately adjacent to said "W" street and said Thirty-seventh street, being of great depth, to wit, of a depth varying from six (6) to ten (10) feet, and the bottom of said pit or pond being covered with a dangerous muddy and sticky mire of great thickness, to wit, of the thickness of two (2) feet; and the defendant, Virginia C. Huidekoper, negligently and carelessly kept and maintained said dangerous pit or pond upon
4 said block 146, in a wholly unprotected, unguarded and unenclosed condition and in the condition and under the circumstances aforesaid; and, although both the defendants had full knowledge of all the matters and things hereinbefore set out, and also had knowledge that said dangerous pit or pond was occasioned and existed in the condition aforesaid, and was attractive to young children of tender age, and incapable of exercising ordinary care and prudence, and that large numbers of such children were attracted to and by said pit or pond, and were accustomed to and did frequent and play about and wade and swim in the aforesaid dangerous pit or pond, yet the defendants negligently and carelessly, during a long period of time, to wit, about — years, prior to the injuries hereinafter complained of, allowed said dangerous pit or pond to remain in the conditions aforesaid, and without doing anything whatever necessary to protect or guard such children from the dangers of such pit or pond, or to render said pit or pond safe or secure.

And the plaintiff's intestate being an inhabitant of the city of Washington and living with his parents therein in the vicinity of said dangerous pit or pond, and being a child of tender years and incapable of exercising ordinary care and prudence, and without discretion or judgment in matters relating to dangerous pits or ponds, and ignorant of the dangerous character of the pit or pond aforesaid, was, on to wit, the 8th day of June, A. D., 1904, in company with other young children, attracted to said pit or pond, and did on said date with other young children, visit said pit or pond and while playing at or about the same, the plaintiff's intes-
5 tate, without any negligence or want of due and proper care on his part, fell or went into said pond and was drowned.

And the said plaintiff's intestate, whose death was caused as aforesaid, left surviving him a father and mother, and a brother and a sister, and by reason of the premises and the statute in such case

made and provided, an action for damages has accrued to the plaintiff in the sum of ten thousand dollars ($10,000).

Wherefore, she brings this suit and claims damages in the sum of ten thousand dollars ($10,000), besides costs.

LECKIE & FULTON &
JOSEPH W. COX,
Att'ys for Plaintiff.

Notice to Plead.

The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof; otherwise judgment.

LECKIE & FULTON,
JOSEPH W. COX,
Att'ys for Plaintiff.

6 *Demurrer of Defendant.*

Filed December 7, 1904.

In the Supreme Court of the District of Columbia.

NONIE L. SULLIVAN, Administratrix of the Estate of Arthur J. Sullivan, Deceased, Plaintiff, *vs.* VIRGINIA C. HUIDEKOPER and THE DISTRICT of Columbia, a Corporation, Defendants.	Law. No. 47090.

And now comes the defendant, Virginia C. Huidekoper, by her attorneys, and says that the declaration in the above entitled cause as to her is bad in substance.

NOTE.—Among the matters of law to be argued in support of said demurrer are:

First. The declaration fails to set forth any facts to show that the said defendant owed the plaintiff any duty whatever.

Second. The declaration fails to allege any acts, either of omission or commission, on the part of the said defendant, which would amount to negligence in law.

Third. Other defects apparent upon the face of the declaration.

REGINALD S. HUIDEKOPER,
COLE & DONALDSON,
Attorneys for Defendant, Virginia C. Huidekoper.

7 *Amendment to Declaration.*

Filed April 20, 1905.

In the Supreme Court of the District of Columbia.

NONIE L. SULLIVAN, Administratrix of the Estate of Arthur J. Sullivan, Deceased, Plaintiff,
vs.
VIRGINIA C. HUIDEKOPER and THE DISTRICT OF Columbia, a Corporation, Defendants.
} Law. No. 47090.

Leave of court first being had and obtained, the plaintiff files the following amendment to her declaration filed in the above entitled cause:

On page 4, beginning in the fourth line after the words, "to render said pit or pond safe or secure," insert the following, "although the said pit or pond could have easily been drained and the aforesaid dangerous conditions obviated or removed, with little or no difficulty or expense on the part of the defendants, or either of them."

LECKIE, FULTON & COX,
Attorneys for Plaintiff.

Endorsed: Leave to file is hereby given this 20th day of April, A. D. 1905. Job Barnard justice.

Order Sustaining Demurrer.

Supreme Court of the District of Columbia.

FRIDAY, *May* 12, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

* * * * * * *

8 NONIE L. SULLIVAN, Adm'x, Pl'ff,
vs.
VIRGINIA C. HUIDEKOPER ET AL., Def'ts.
} At Law. No. 47090.

Upon hearing the demurrer of the defendant Huidekoper to the declaration, it is considered that the same be, and hereby is. sustained.

Opinion.

Filed May 12, 1905.

In the Supreme Court of the District of Columbia.

NONIA L. SULLIVAN, Administratrix of the Estate of Arthur J. Sullivan, Deceased, Plaintiff,
vs.
VIRGINIA C. HUIDEKOPER and THE DISTRICT OF Columbia, Defendants.
} # 47090. Law.

The declaration in this case is filed by the administratrix of an infant, who it is averred, was drowned in a pool of water standing upon the property of the defendant, Huidekoper; and The District of Columbia is made a defendant because of its alleged negligence in causing the formation of the said pond or pool of water, and its continuation upon the lot of the defendant, Huidekoper.

The averments are, that the District of Columbia negligently constructed and maintained a portion of "W" street, at the intersection of 32nd street in the city of Washington, in such a manner as to cause a deep and dangerous depression in block 146, by rea-
9 son of which the water of two small streams, became dammed up and collected, so as to form a dangerous pond, about two hundred and fifty (250) feet long, and ninety (90) feet wide, immediately adjacent to said "W" street and 32nd street, and of the depth of from six (6) to ten (10) feet; and that the defendant, Virginia C. Huidekoper, the owner of said block or square, being block 146 in part of Burleith addition to West Washington, carelessly and negligently kept and maintained said dangerous pond, unprotected, unguarded and unenclosed, with the knowledge that said dangerous pond was so occasioned and so existed; that it was attractive to young children; and that defendants knew that large numbers of such children were attracted to said pond, and were accustomed to play about, and wade and swim in the same.

That the plaintiff's intestate, being a child of tender years, and being attracted there, with other young children, while playing at or about same, on the 8th of June, 1904, fell into said pond and was drowned.

To this declaration the defendants have each demurred, and the demurrer of the defendant, Virginia C. Huidekoper, has been argued and submitted to the court for its judgment.

It is stated in the demurrer of Mrs. Huidekoper, as matters of law to be argued, that the declaration fails to state any facts to show that the defendant owed the plaintiff's intestate any duty whatever; and also that the declaration fails to allege any acts which would amount to negligence in law on the part of the defendant.

It was intimated by counsel for plaintiff, that the action
10 so far as it relates to the District of Columbia, would be discontinued, so that no question now arises as to the sufficiency of the declaration as against said District; but as to the defendant, Huidekoper, counsel for the plaintiff insist that the said pond was of a nature to attract young children; that the defendant knew it was so dangerous, and did attract large numbers of children; and that such dangerous attraction could have been easily removed by the defendant, either by fencing the said lot, or by opening a drain to allow the water to run off; and that with this knowledge, and her failure to do what it is claimed a reasonable and prudent person should have done in the premises, she is guilty of actionable negligence, and must therefore respond in damages, by reason of the death of the plaintiff's intestate.

The declaration contains a further averment, that the deceased boy left surviving him a father, a mother, and a brother and a sister; but it nowhere avers the exact age of the deceased, although in argument, counsel have stated that his age was about ten years.

There seems to be some question as to whether this action may be maintained under the statutes in force in this District, being now sections 1301 and 1303 of the Code, which provide that in an action causing the death of the plaintiff's intestate, damages shall be assessed with reference to the injury resulting from the act causing the death, "to the widow and next of kin of such deceased person."

McGraw *vs.* District of Columbia, 3rd Appeals, D. C., 405.

11 This question, however, has not been argued, and the query is one that need not be answered by the court at present.

The question seems to be, has the defendant been guilty of any negligent act of commission or ommission which renders her responsible for the death of the plaintiff's intestate?

Counsel for the plaintiff insist that the doctrine laid down by the Supreme Court of the United States, in what are known as the "Turn-table cases," is applicable to this case; and that therefore the defendant must be held to have been negligent in the creation of the pond, and in failing to drain the same, or to barricade it.

It is not claimed that the defendant did any act to create the pond, but the alleged negligence with reference to the creation of the same, is that the defendant knew that the District was creating such a pond by grading the streets, as stated in the declaration; and that her failure to counteract the result of the work performed by the District does render her liable for its creation.

They cite a number of authorities from State courts which seem to hold that any dangerous machinery left unguarded on their premises, which is attractive to children, and which is known to attract children, will render the owners liable in case children are attracted to the same, and injured thereby; and they seem to apply this doctrine to various kinds of movable appliances, or heavy, unstable things that were attractive, and would be dangerous to the touch of children.

12 One case, at least, seems to hold that the same doctrine is applicable to a defendant who maintains a pool of hot water on his premises into which a child of the age of six years had walked, and was injured.

There are a number of other cases from the State court, that hold that a pool of water, which is caused by natural or artificial means, upon unenclosed premises, does not subject the owner to any action for injury received by children or adults in going upon the land, and being injured by reason of the pool of water. They hold that the doctrine of the "Turn-table cases" ought not to be extended.

Some of the cases hold that if the dangerous excavation, or pond, is so close to the public highway as to be dangerous to persons passing along the highway by causing them to fall in and be injured, the land owner may be liable; and that is one point that counsel insist will render the defendant in this case liable. But the answer to that is, that in this case no one fell in from the highway; and the allegation is, that the child was playing about the pond on the premises of the defendant, in company with other young children, and fell, or went into said pond, and was drowned.

There is no averment that the child was going along the highway and fell in by reason of any unguarded and dangerous place; and therefore the proximity to the street, and danger to persons while using the same, have no bearing upon the plaintiff's right to maintain this action.

A number of the cases cited by counsel for the defendant, hold that it makes no difference whether the pond, which is alleged to be dangerous, was one arising from natural causes on the
13 land of the defendant, or whether it was created by the affirmative act of the defendant; that in either event it was only a body of water, the consequences of going or falling into which would be the same in either case. Such a fact in nature is one that is common to all countries, not deserts, and the danger of drowning by going into the water, is an open danger, the knowledge of which is common to all persons.

It is also a fact well known that children, especially boys of the age of ten years, are naturally attracted to a body of water as affording amusement, or an opportunity to bathe or swim. A fruit tree, bearing ripe fruit, is also an attractive place for boys, and they frequently visit orchards, and climb into the trees, as most farmers know.

The law does not, however, require that trees or ponds must be barricaded, or cut down, or drained, in order to prevent persons, including children, who may come upon the premises as trespassers, from receiving injury by reason of such attractive and dangerous things; so that the doctrine of the "Turn-table cases" is not applicable to all dangerous and attractive situations which may exist on the premises of a land owner.

It seems to me that the weight of authority upon this proposition is against the plaintiff's right to recover. There certainly could

have been no cause of action for which an adult could have maintained a suit, if such a person had been injured by going, uninvited and without license, upon the defendant's premises, and suffering an injury by reason of the said pond; and the only claim that
14 the plaintiff has to maintain such an action is based upon the fact that the deceased was an infant of tender years.

I am unable to find, however, that it is incumbent upon the defendant to safe-guard the pond on her premises in order to escape liability for an injury resulting to children, by reason of any facts alleged in the declaration; and I will therefore sustain the demurrer.

JOB BARNARD, *Justice.*

Judgment on Demurrer.

Supreme Court of the District of Columbia.

MONDAY, *June* 5, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

* * * * * * *

NONIE L. SULLIVAN, Administratrix of the Estate of Arthur J. Sullivan, Deceased, Pl'ff,
v.
VIRGINIA C. HUIDEKOPER and THE DISTRICT of Columbia, a Corp., Def'ts. } At Law. No. 47090.

Upon motion of the defendants for judgment, it appearing that the plaintiff does not care to plead further, judgment on the demurrer is ordered; therefore it is considered that the plaintiff take nothing by her suit, and that the defendants go thereof without day and recover against the plaintiff their costs of defense to be taxed
15 by the clerk, and have execution thereof.

Order for Appeal, &c.

Filed June 7, 1905.

In the Supreme Court of the District of Columbia, the 7th Day of June, 1905.

SULLIVAN
vs.
HUIDEKOPER ET AL. } At Law. No. 47090.

The clerk of said court will please note an appeal to the Court of Appeals from the judgment against the plaintiff, as to the defendant Huidekoper & issue citation against said defendant.

LECKIE, FULTON & COX,
Attorneys for Plaintiff.

16 In the Supreme Court of the District of Columbia.

NONIE L. SULLIVAN, Administratrix of the Estate of Arthur J. Sullivan, Deceased,
vs.
VIRGINIA C. HUIDEKOPER and THE DISTRICT of Columbia.
} At Law. No. 47090.

The President of the United States to Virginia C. Huidekoper, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the rules of said court, pursuant to an appeal filed in the clerk's office of the supreme court of the District of Columbia, on the 7th day of June, 1905, wherein Nonie L. Sullivan, administratrix of the estate of Arthur J. Sullivan, deceased, is appellant, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Harry M. Clabaugh, chief justice of the supreme court of the District of Columbia, this 7th day of June in the year of our Lord one thousand nine hundred and five.

J. R. YOUNG, *Clerk*,
By W. E. WILLIAMS, *Ass't Clerk*.

Service of the above citation accepted this 7th day of June, 1905.

REGINALD S. HUIDEKOPER,
Attorney for Appellee.

[Endorsed:] No. 47090. Law. Nonie L. Sullivan, adm'x, *vs.* Virginia C. Huidekoper *et al.* Citation. Issued Jun- 7 1905. Served cop- of the within citation on —— —— —— ——, marshal. Leckie & Fulton, Jos. W. Cox, attorneys for appellant.

17 *Memorandum.*

June 15, 1905.—Appeal bond filed.

Order to Clerk for Preparation of Record.

Filed June 15, 1905.

In the Supreme Court of the District of Columbia, the 15th Day of June, 1905.

NONIE L. SULLIVAN, Administratrix,
vs.
VIRGINIA C. HUIDEKOPER ET AL. } At Law. No. 47090.

The clerk of said court will please prepare record for Court of Appeals including in the same, declaration, demurrer of defendant, Huidekoper, amendment to declaration, order sustaining demurrer (M. 46 p. 168) opinion of court, judgment on demurrer (M. 46 p. 197) appeal by plaintiff, citation, memorandum of appeal bond and this order.

LECKIE, FULTON & COX,
Attorneys for Plaintiff.

18 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 17, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 47,090, at law, wherein Nonie L. Sullivan, administratrix of the estate of Arthur J. Sullivan, deceased, is plaintiff, and Virginia C. Huidekoper and The District of Columbia, a corporation, are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 18th day of July, A. D. 1905.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1591. Nonie L. Sullivan, administratrix of the estate of Arthur J. Sullivan, deceased, appellant, *vs.* Virginia C. Huidekoper. Court of Appeals, District of Columbia. Filed Jul- 27, 1905 Henry W. Hodges, clerk.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

No. 1591.

NONIE L. SULLIVAN, ADMINISTRATRIX OF THE ESTATE OF ARTHUR J. SULLIVAN, DECEASED, APPELLANT,

vs.

VIRGINIA C. HEIDELKOPER, APPELLEE.

BRIEF FOR APPELLANT.

A. E. L. LECKIE,
CREED M. FULTON,
JOSEPH W. COX,
Attorneys for Appellant.

principle sought to be invoked by the plaintiff is developed from the maxim, "Sic utere tuo ut alienum non laedas." The test to be applied is: Do the facts alleged show on the part of the defendant the "omission to do something which a reasonable, prudent man, guided by those considerations that ordinarily regulate the conduct of human affairs, would do, or the doing something that such a man would not do under all the circumstances of the particular transaction?"

I.

A Land Owner Owes a Duty to a Child Trespasser, Where the Presence of the Child is Known or Ought to be Known.

The primary question underlying this discussion involves the duty of a land owner to a child, who may be technically a trespasser upon his premises. Does the land owner owe any duty to such child? And, if so, what is the nature of that duty?

A number of cases lay down the rule broadly, that an owner of premises owes no duty with reference to the safety or immunity from injuries of trespassers thereon. These cases will be found collated in 21 A. & E. Ency. of Law (2d ed.), page 472.

But the preferable view is that—

> "a party's liability to trespassers depends on the former's contemplation of the likelihood of their presence on the premises and the probability of injuries from contact with conditions existing thereon. While, as a rule, a party will not be deemed to anticipate the commission of a wilful wrong, yet where, under the circumstances, a technical trespass may reasonably be anticipated, the owner of the premises will be liable for a failure to take reasonable precautions to prevent injuries to the trespasser."
>
> 21 A. &. E. Ency. (2d ed.), 473.

And in the case of children, who are trespassers, it seems to be universally recognized that there may be liability for their injury.

> "The doctrine that the owner of premises may be liable in negligence to trespassers whose presence on the premises was either known or might reasonably have been anticipated is well applied in the rule of numerous cases, that one who maintains dangerous implements or appliances on uninclosed premises of a nature likely to attract children in play, or *permits dangerous conditions thereon*, is liable to a child who is injured, though a trespasser at the time when the injuries are received; and, with stronger reason, where the presence of a child trespasser is actually known to a party, or where such presence would have been known had reasonable care been exercised, there may be liability in negligence for injuries sustained—a doctrine acquiesced in by even the strongest advocates of the rule that there is no duty to trespassers."
>
> 21 Encyc. A. & E., pp. 473–474.

The most famous case upon this subject, and one which a majority of the courts of the country have followed, is the Sioux City Railroad Company *vs.* Stout, 17 Wallace, 657, which is often referred to as the "Turntable Case." Although its doctrine has often been criticised, and some courts have declined to follow it, the reasoning of the opinion has generally been accepted as conclusive and as firmly establishing the law as just quoted with reference to *dangerous implements and appliances on uninclosed premises.*

Some courts have held that the doctrine of the Stout case should not be extended, but must be confined exclusively to cases of dangerous machinery. (These cases will be referred to in a subsequent section of the brief.) But, if the principle is sound, there would seem to be no good reason why it should be confined in its application

to the keeping of dangerous machinery by the land owner, and not to other acts that may just as easily and probably produce the injury that the rule was designed to prevent.

In a later case, Union Pacific Railroad Company *vs.* McDonald, 152 U. S. 262, the Supreme Court has extended the doctrine of the Stout case and made it apply not only to dangerous machinery, but to *dangerous conditions* existing on uninclosed property. In the McDonald case a boy was burned in a slack pit kept upon the land of the railroad company. The company had failed to fence the pit, as it was their duty to do, as required by statute, and on this ground the court held that as a matter of law the company was guilty of negligence. The general question, however, presented by the case was, in the language of the court, "whether the owner or occupant of premises is liable under any circumstances, and if so, under what circumstances for injuries received" by a child trespasser. And the court, after a full review of the authorities, in a masterly opinion by Justice Harlan, announced that it adhered to the principles of the Stout case, and applied them to the *dangerous condition* that existed upon the land of the company. A careful examination of these two cases shows, we believe, conclusively, that the rule above quoted from the Encyclopedia is fully supported by the decisions of the Supreme Court, and constitutes the correct test by which the declaration is to be tried.

II.

Tested by This Rule, the Declaration States a Cause of Action.

Admitting the allegations of the declaration, a *dangerous condition*, namely, a dangerous pit or pond, was upon the premises, uninclosed and unguarded. It was in a place

frequented by large numbers of young children. It was not only of a nature to attract such children, but it did attract them, and the defendant knew that they were attracted to it. It was not a natural pit or pond, but was one made or caused to be made by the defendant. Its dangerous character could have been easily obviated "with little or no difficulty on the part of the defendant." Every element is stated that is required by the rule to create liability in negligence on the part of the defendant for the injuries sustained.

In this connection, it is interesting to note the reasoning of the Supreme Court in the Stout case upon a condition of facts strikingly similar to those here presented.

> "Was there negligence on the part of the railway company in the management or condition of its turn-table?
>
> "If from the evidence given it might justly be inferred by the jury that the defendant, in the construction, location, management, or condition of its machine, had omitted that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow, the jury was at liberty to find for the plaintiff.
>
> "That the turn-table was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred to the plaintiff. There was the same liability to injure him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he had suffered a serious injury, by his foot being caught between the fixed rail of the road-bed and the turning rail of the table, they were justified in believing that there was a probability of the occurrence of such accidents.
>
> "So, in looking at the remoteness of the machine from inhabited dwellings, when it was proved to the jury that several boys from the hamlet were at play there on this occasion, and

that they had been at play upon the turn-table on other occasions, and within the observation and to the knowledge of the *employees* of the defendant, the jury were justified in believing that children would probably resort to it, and that the defendant should have anticipated that such would be the case.

"As it was in fact, on this occasion, so it was to be expected that the amusement of the boys would have been found in turning this table while they were on it or about it. This could certainly have been prevented by locking the turn-table when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant. It could probably have been prevented by the repair of the broken latch. The jury may well have believed that if the defendant had incurred the trifling expense of replacing this latch, and had taken the slight trouble of putting it in its place, these very small boys would not have taken the pains to lift it out, and thus the whole difficulty would have been avoided. Thus reasoning, the jury would have reached the conclusion that the defendant had omitted the care and attention it ought to have given, that it was negligent, and that its negligence caused the injury to the plaintiff. The evidence is not strong and the negligence is slight, but we are not able to say that there is not evidence sufficient to justify the verdict. We are not called upon to weigh, to measure, to balance the evidence, or to ascertain how we should have decided if acting as jurors."

17 Wallace, 661, 662.

If we reason from the facts stated in the declaration as the Supreme Court reasons in the Stout case, it is submitted that but one conclusion can be reached, namely, that the declaration states a cause of action. Indeed, the facts stated in the declaration are even stronger than those in the Stout case, for here, it is alleged, the plaintiff knew that children played about the pond, while in

the Stout case the court held the jury might have been justified in finding, from the situation of the turn-table, that the defendant should have known that children would probably resort to it.

III.

The Conclusion Reached in the Preceding Section is Confirmed by the Cases Relating to Ponds Where Such Cases Follow the Supreme Court Doctrine.

A case similar to that under consideration is Pekin *vs.* McMahon, 154 Ill. 141, in which the suit was against the city of Pekin to recover damages for the death of a boy, who was drowned in a pond or pool of water on a vacant lot owned by the city. The case reviews at length the authorities upon this subject, and following the Stout case, held the city liable. The opinion holds there is no substantial difference between the Turn-table cases and the case at bar, and goes upon the theory that negligence arises, not from exposing or neglecting any particular thing, but from the conduct of the owner of the land, under the circumstances of the case. The court said:

> "Although a child of tender years, who meets with an injury on the premises of a private owner, may be a technical trespasser, yet the owner may be liable, if the things causing the injury are left exposed or unguarded and are of such a character as to be an attraction to the child, appealing to his childish curiosity and instincts. Unguarded premises, which are thus supplied with dangerous attractions, are regarded as holding out implied invitations to such children. The owner of land where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in safe condition; for they, being without judgment, and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers, and mere licensees."

In Price *vs.* Atchison Water Company, 58 Kansas, 551, it was held that a company which maintains upon its grounds deep reservoirs of water, attractive to small boys, who, to its knowledge and with its permission, resort thereto for fishing and for playing, and which takes no reasonable precautions to prevent accident to them while engaged in such amusements, is liable in damages if one of them, without negligence on his part, falls in and is drowned. The case is exactly in point and fully sustains the claims made in the declaration.

In the case of Car Company *vs.* Cooper, 60 Ark. 545, an action was brought against the owner of land for damages received by a child by walking into a pool of hot water. The court, following the Stout case, held:

> "The jury should have been instructed that in determining whether the defendant was liable or not for the injury received by the child, they should consider whether it appeared from the evidence that the pool of water was attractive to children of the age of the appellee, and whether this was or ought to have been known to the appellant, and whether, from all the circumstances in evidence, it appeared that the appellant, as a reasonably prudent person, ought to have anticipated that children of the age of the plaintiff would probably receive such injury as the plaintiff did receive, by reason of the situation and condition of the pool of water.
>
> "Children are required to exercise only such care and prudence as may reasonably be expected [of them as children]. The owner of land is not required to provide against remote and improbable injuries to children trespassing thereon. But he is liable for injuries to children when it is known to him that they are accustomed to go upon it, and that, from the peculiar nature, and exposed and open condition of something thereon which is attractive to children, he ought reasonably to anticipate such an injury to a child as that which actually occurs."

The case of Kinchlow *vs.* Elevator Company, 57 Kansas, 374, was an action to recover damages to a boy caused from falling into a barrel of hot water, and being scalded. The steam exhaust barrel of the defendant was sunk into the ground, so that its top was level with the surface, and close to the elevator. The covering of the barrel lay loose on top. On each corner of the building were signs, "Danger, Keep Away." There was no guard or rail about the barrel, or no words of special warning as to the danger of it. A boy 10 years of age went to the barrel and stood on the cover to warm his feet, and the cover tipped, causing him to fall in. The court below directed a verdict for the defendant, but the appellate court held there was evidence from which a jury might infer negligence of the defendant in maintaining the barrel in the place and condition described. There was evidence that it was attractive to children and dangerous.

Other cases applying the rule to other conditions than dangerous machinery are cited in Pekin *vs.* McMahon, supra, and in Thompson on Negligence, secs. 1030–1036.

See, also, Hydraulic Works Company *vs.* Orr, 83 Pa. 332.

Coppner *vs.* Pennsylvania Company, 12 Ill. App. 600.

Birge *vs.* Gardner, 19 Conn. 507, 512.

Railroad Company *vs.* Fitzsimmons, 22 Kan. 686.

Fort Worth *vs.* Robertson, 14 L. R. A. 781, note.

Whirley *vs.* Whiteman, 1 Head. (Tenn.) 610.

Indianapolis *vs.* Emmelman, 108 Ind. 530.

In the scholarly note upon Barnes *vs.* Shreveport R. R. Co., found in 49 American State Reports, after a full review of the authorities upon the liability of a land owner, under such circumstances, it is said, at page 419:

> "The better view is that children, wherever they go, must be expected to act upon childish in-

stincts and motives; and others, who are chargeable with a duty of care and caution towards them, must calculate upon this, and take precautions accordingly. If they leave exposed to the observation of children anything tempting to them, and which they, in their immature judgment, might be expected to play with or handle, they should expect that liberty to be taken. Hence, though a child of tender years meets with injury on the premises of a private owner, such owner is liable if the things causing injury have been left exposed and unguarded, and are of such a character as to be attractive to a child, appealing to his childish curiosities and instincts. So, it follows, if the land of a private owner is in a thickly-settled community, and has upon it dangerous machinery or a *dangerous pit or pond* of such a character as to be attractive to children of tender years, incapable of exercising ordinary care, and he has notice of its attractions for children of that class, he is under obligation to use reasonable care to protect them from injury when coming upon such premises, though they may be trespassers thereon."

All the foregoing cases are among those cited with commendation in Thompson on Negligence, secs. 1031–1036, as stating the true rule and tending to the conclusion that the owner of *any machine or other thing* in its nature attractive to children and dangerous to them "is under the duty of exercising reasonable care to the end of keeping it fastened, guarded, or protected, so as to prevent them (children) from injuring themselves while playing or coming in contact with it." It is respectfully submitted that they fully sustain the contention of the appellant in the case at bar.

NOTE.—It may be argued that Pekin *vs.* McMahon, and Union Pacific Railroad Company *vs.* McDonald (supra), are inapplicable to this case, for the reason that there was in the first an ordinance, and in the second a statute,

which were in effect and being violated by the defendants at the time the injuries complained of happened.

The opinions in both cases go upon the theory that there was negligence without reference to the ordinance or the statute.

The ordinance in the McMahon case was to the effect that—

> "any owner or occupant or person in possession of any uninclosed lot or parcel of ground . . . who shall make or cause to be made in such . . . lot or parcel, any pit or hole of such depth and character as to be considered dangerous, unsightly, or a source of annoyance to the persons residing in the vicinity thereof, or adjacent thereto, shall be deemed guilty of creating a nuisance."

In the District of Columbia, at the time the death occurred, the following statute and regulations were in force, under which the police authorities treat ponds and pools as nuisances:

> "The existence on any uninclosed lot or parcel of land in the city of Washington, or its more densely populated suburbs, of any uncovered well, cistern, dangerous hole, or excavation, is hereby declared a nuisance, dangerous to life and limb."
>
> Section 4 of the act of March 1, 1899, Building Regulations, pp. 17 and 18.

> "It shall be unlawful for the owner or occupant of land in the District of Columbia, to allow any well, cistern, or excavation thereon to be unfenced, uncovered, or in a condition dangerous to life or limb."
>
> Sec. 1, Art. 17, Police Regulations.

> "No person owning or having possession of land in the District of Columbia shall allow water to stand thereon in any manner whatsoever, so as to

endanger the health of persons living in the vicinity of the land."

Sec. 25a, Order of June 25, 1901, Health Regulations.

Appendix H, Report of Health Officer for 1903.

IV.

The Cases Holding No Liability for Drowning of Children Are Inconsistent with the Supreme Court Doctrine or May Be Distinguished from the Case at Bar.

There are numerous cases relied on by the appellee, holding that no liability exists on the part of the land owner for the drowning of a child in a pool or pond upon his premises. It is believed that none of them are authority to authorize the sustaining of the demurrer, and that a careful examination will disclose that they fall into one of three classes:

(1) *Cases that Refuse to Follow the Supreme Court Rule.*

Such are Clarke *vs.* Manchester, 62 N. H. 578, in which it is said:

"The fact that the person who suffered injury and death was an infant does not change the question, nor create a liability against the defendant where none would have existed in case of an injury to an adult person under similar circumstances. The corporation owed no special duty to the child straying from its parents, beyond what they owed generally to all classes of persons."

Murphy *vs.* City of Brooklyn, 118 N. Y. 529.

Greene *vs.* Linton, 27 N. Y. Supp. 894.

Richards *vs.* Connell, 45 Neb. 467, which follows Clarke *vs.* Manchester—

and holds with reference to children, that:

"There is no rule which would protect those

who go where they are not invited, but merely from curiosity or motives of private convenience."

Hargreaves *vs.* Gleason, 25 Mich. 1, in which it is said:

"We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or from relations with the occupant."

Gillespie *vs.* McGowan, 100 Pa. St. 144, which holds:

"It is settled by abundant authority that to enable a trespasser to recover for an injury, he must do more than show negligence. It must appear that there was a wanton or intentional injury inflicted on him by the owner."

Klix *vs.* Neiman, 68 Wis. 271, which follows Hargreaves *vs.* Gleason.

Overholt *vs.* Vieths, 93 Mo. 422, which relies upon the two cases last mentioned.

Moran *vs.* Pullman Palace Car Company, 134 Mo. 641, following Overholt *vs.* Vieths.

(2) *Cases that Hold the Turntable Doctrine an Exception to the General Rule of Law and Confine its Application to Cases of Dangerous Machinery.*

Such are—

Railway Company *vs.* Dobbins, 40 S. W. 861.
Stendal *vs.* Boyd, 73 Minn. 53.
Peters *vs.* Bowman, 115 Cal. 345.

Some of the cases mentioned under (1) might also be mentioned here.

(3). *Cases Where the Facts do not Come within the Rule of the Stout Case or of Pekin vs. McMahon.*

Cooper *vs.* Overton, 102 Tenn. 211, which is a well-con-

sidered case and reviews all the authorities. In this case it is said :

> "The authorities cited are in direct conflict upon what may be said to be the real issue in this case. But we hold, upon reason and weight of authority, that liability does not exist even in the case of children, unless they are induced to enter upon the land by something attractive placed upon it by the owner, or, with his knowledge, permitted to remain there, and this is the doctrine of the Turn-table cases. In the case at bar, the proof wholly fails to show that the owner of this property caused the water to stand upon the lot in a pond, but this was done by the city . . and the proof does show affirmatively that the owner did not know of the existence of the pond or its dangerous character, and that he also, through his agents, looked after the property with as much diligence as should be required. . . . The leading cases relied on by plaintiff . . . have as an important and essential feature, the creation of danger and actual knowledge of it by the owner, neither of which features exists in this case."

Other cases cited under (1) and (2) are distinguished in Pekin *vs.* McMahon.

It may be noted that the courts of New Hampshire and New York expressly repudiate the Turn-table doctrine. See Frost *vs.* Eastern Railroad Company, 64 N. H. 220; Walsh *vs.* Fitchburg Railroad Company, 145 N. Y. 301; and that Gillespie *vs.* McGowan is not in harmony with other decisions in Pennsylvania. See Gramlich *vs.* Wurst, 86 Pa. St. 74, and Hydraulic Works Company *vs.* Orr, 83 Pa. St. 332, the opinion in which is quoted from in section 1033, Thompson on Negligence.

Of many of the cases relied upon by the defendant, it is said by Thompson, in his Commentaries on Negligence, sec. 1026:

> "One doctrine is, that if a child trespass upon

> the premises of the defendant and is injured in consequence of something that befalls him while so trespassing, he can not recover damages unless the injury was wantonly inflicted or was due to the recklessly careless conduct of the defendant. This cruel and wicked doctrine, unworthy of a civilized jurisprudence, puts *property* above *humanity*, and leaves entirely out of view the tender years and infirmity of understanding of the child—indeed his inability to be a trespasser in sound legal theory—and visits upon him the consequences of his trespassing just as though he were an adult."

And, with the possible exception of Cooper *vs.* Overton, which is clearly distinguishable from the case at bar, they are all out of harmony with the Supreme Court cases, and, therefore, valueless as authorities in this jurisdiction.

V.

Upon the Facts Alleged, the Question of Negligence is to be Passed Upon by the Jury and Not by the Court.

The rule of the Stout case is not an exception that is to be confined to any particular kind of implements or appliances, but it states a principle of law that imposes a duty upon a land owner with reference to children, whose presence upon his property should be foreseen. Since negligence arises from what a man does or fails to do under the circumstances of each particular case, it is arbitrary and illogical to hold that a land owner can be negligent in regard to nothing upon his premises but machinery or appliances; and it is equally arbitrary and illogical to say that there are classes of property or con-

ditions upon property as to which the owner can not be negligent. Each machine and each pond alleged to be dangerous must stand in a class by itself, and the conduct of the land owner must be considered under the circumstances of each case as disclosed by the evidence. Occasionally, from the evidence, as a matter of law, the court may be able to determine the presence or absence of negligence, but as a rule the question must be determined by the jury.

> "Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that there was negligence; another man, equally sensible and equally impartial, would infer that proper care had been used and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.
>
> "In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not

uniform or harmonious, that the authorities justify us in holding, in the case before us, that, although the facts are undisputed, it is for the jury and not the judge to determine whether proper care was given or whether they establish negligence."

Sioux City and Pacific R. R. Co. *vs.* Stout, 17 Wall 657–665.

"The question whether a defendant has or has not been guilty of negligence, in case of such an accident upon his land to a child of tender years, is for the jury. Involved in this question is the further question, whether or not the premises were sufficiently attractive to entice children into danger and to suggest to the defendant the probability of the occurrence of such accident; and such further question is also a matter to be determined by the jury."

Pekin *vs.* McMahon, 154 Ill. 141, 153.

"Duties arise out of circumstances. Hence, where the owner has reason to apprehend danger, owing to the peculiar situation of his property and its openness to accident, the rule will vary. The question then becomes one for a jury, to be determined upon all the facts of the probability of the danger and the grossness of the act of imputed negligence. . . . The mind, impelled by the instincts of the heart, sees at once that in such a place and under such circumstances, he (the defendant) had good reason to expect that one day or other, some one, probably a thoughtless boy in the buoyancy of play, would be led there, and injury would follow . . . The common feeling of mankind . . . and the common sense of jurors must be left in such a case to pronounce upon the facts."

Hydraulic Works Co. *vs.* Orr 83 Pa. St. 332, 335.

It is respectfully submitted that the court below erred in sustaining the demurrer to the declaration, and that its judgment should be reversed.

Every consideration of humanity and public policy imposes upon all persons the duty to use their property so as not to injure thoughtless and innocent children. This court is now asked to declare that it is the law of the District of Columbia that land owners must hold and use their property with due regard to the lives and safety of the thousands of children of this city.

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